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THE SHERMAN ACT AND THE NEW ANTI-TRUST LEGISLATION. III

In this concluding paper I shall try to weigh the importance of the new legislation and to suggest some of its possible consequences. The topics which I shall consider are (1) the exemption of labor combinations, (2) the limitations put upon the use of holding companies, (3) the prohibition of interlocking directorates, (4) the condemnation of certain trade practices, (5) the power of the Federal Trade Commission over unfair methods of competition, and (6) the general powers and functions of the Commission.

The sixth section of the Clayton act, exempting labor combinations from the condemnation of the anti-trust laws, is as follows:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

The interpretation of this section may seem to be somewhat complicated by the inclusion of "agricultural or horticultural organizations." This is to be attributed, of course, to the desire of the labor leaders to secure for this section the support of

the senators and representatives from agricultural states. Agricultural organizations themselves were not actively engaged in lobbying for the enactment of these provisions. Most agricultural co-operative associations are conducted for profit and so are not specifically exempted by this section. Few, if any, of these, however, fall under the condemnation of the anti-trust laws. Agreements to maintain prices or to restrict output are not common among agriculturists. Attempts to come to such agreements, such as have been made by cotton- and tobacco-growers, have always been ineffective. I do not think that the exemption of agricultural organizations has any real importance, and there is no reason to suppose that it was intended to have importance.

The labor leaders who were active in the campaign for exemption professed to be satisfied with the section as it stands. But the opposition to it would undoubtedly have been firmer than it was if there had not been a belief on the part of many that it effected no substantial change in the existing status of labor organizations under the Sherman act. When the essential features of the present section were first decided upon, President Wilson stated in an interview that it did not exempt labor organizations from the operation of the Sherman law. Similar statements were frequently made in the congressional debates and as frequently challenged. For a final settlement of the question we must wait, of course, for court decisions, but some points seem even now to stand out rather clearly.

The declaration, "The labor of a human being is not a commodity or article of commerce,"[1] is little more than an empty *blague*, and the permission given to individual members of labor organizations to "lawfully carry out the legitimate objects thereof" is at once harmless and unavailing. If there is any effectiveness in the section it is in the clause, "nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

[1] The suits brought against labor unions under the Sherman act have not charged them with monopolizing "labor." It is an amusing circumstance that the first appeal to the protection of this clause should have been made by an employers' combination—the so-called "baseball trust."

Now no action has ever been brought for the dissolution of a labor union under the Sherman act. But Mr. Gompers, testifying before the House Committee on the Judiciary, said that labor combinations exist only by the tolerance of the Attorney-General. If Mr. Gompers' interpretation of the Sherman act is correct, if that statute condemns unions merely because they are combinations for collective bargaining, then it must be admitted that their specific exemption in this section is a matter of some importance. But there are reasons for thinking Mr. Gompers mistaken.

In the first place, there is enough difference between the sort of "monopoly" which a labor union seeks to establish and such monopolistic industrial combinations as are clearly condemned by the Sherman act to make it uncertain whether the courts would put them in the same category. One is in principle an inclusive, the other an exclusive, monopoly. It is true that railroad mergers, such as were condemned in the Northern Securities and Union Pacific cases, are in some respects "inclusive" combinations. But the St. Louis Terminal Railroad case is a more instructive precedent.[1] The railroad in question has a virtual monopoly of terminal facilities in St. Louis. A suit for dissolution was brought against it under the Sherman act. The Supreme Court did not grant a dissolution order, but merely directed the company so to reconstruct its organization as to provide that new companies might participate in its ownership and be given the advantages of its services on equal terms with the railroads then in control of it. The parallel is not perfect, for the Terminal Railroad of St. Louis is a natural monopoly. But the case suggests that if similar suits had been brought against labor combinations the outcome might have been that the court would merely have insisted that admission to union membership must be granted to all applicants on fair terms.

In the second place, it is doubtful even whether the courts would have deemed themselves authorized by the Sherman act to interfere in any degree either with the conditions of admission to union membership or with the ordinary trade agreements which unions attempt to enforce. For agreements among working-men to fix wages or hours or conditions of employment have only an

[1] 224 U.S. 383.

indirect and incidental effect upon interstate trade or commerce, while the courts have consistently held that the Sherman act covers only agreements which have a direct and primary effect upon such trade or commerce.

In the third place, there is a yet more important consideration which I have pointed out in the first paper of this series.[1] The Sherman act has been brought to bear upon working-men, not because labor unions are in themselves labor monopolies, and as such are in restraint of competition, but merely because strikes and boycotts have the effect of interfering in some degree with the free flow of goods from one state to another. This is, of course, what the labor interests wanted changed. It is not clear, however, that this section alters the law in this respect. I cannot imagine that the courts will hold that the provision that neither labor organizations nor their members shall be "held or construed to be combinations or conspiracies in restraint of trade" covers cases of this kind. If it does, a doubt as to the constitutionality of the section at once arises. It is true that the Supreme Court has recently held that a Missouri anti-trust statute is not in violation of the federal Constitution, despite the fact that the statute specifically exempts labor combinations.[2] But with respect to the matter in hand the question would be whether an exemption of such interference with the "free flow of commerce" as comes from the activities of labor combinations would not amount to a denial of "due process of law" to the members of such other combinations as are condemned for similarly interfering with commerce.[3] It is not a question of the legality of the restraint of competition among working-men. The question is whether labor combinations may restrain *interstate commerce in goods* while such restraint is not permitted to other combinations. It may be that the whole line of cases in which restraint of the free movement of goods from one state to another has been condemned is based upon a twisted interpretation of the meaning of the Sherman act. But until that statute is so amended as to apply merely to restraint of competition as distinguished from

[1] *Journal of Political Economy*, XXIII (March, 1915), 210–13.

[2] *International Harvester Co.* v. *Missouri*, 234 U.S. 199.

[3] Cf. L. P. McGehee, *Due Process of Law*, pp. 60–64.

interference with commerce there seems little chance that the exemption section of the Clayton act can alter in any important degree the present position of labor unions under the Sherman act.

There is, however, another provision in the Clayton act which may give labor combinations virtual immunity from the operations of the Sherman act. This section (the twentieth) prohibits the granting of injunctions by federal courts in labor disputes "unless necessary to prevent irreparable injury to property or to a property right," and specifies that such injunctions shall not prohibit striking, picketing, or boycotting. This in itself does not prohibit civil suits for damages or criminal prosecutions under the Sherman act. Probably it does not prohibit the granting of injunctions on the petition of the government, for the general provisions of the section apply only to cases "between employers and employees." But, so far as the delimitation of the scope of the Sherman act is concerned, such considerations as these become unimportant in view of the fact that the section concludes with the sweeping statement, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." This is the real exemption section. Its constitutionality is a matter about which there is some doubt, but its unconstitutionality is by no means assured. If the courts sustain it, labor unions will have been effectively freed from the restraints of the Sherman act.[1]

The wisdom of the general policy of definitely legalizing strikes and boycotts is a matter which falls outside the province of the present discussion. That as one aspect of this legalization strikes and boycotts can no longer be reached by the Sherman act is, so far as it goes, a fortunate result. But, as I have already tried to show, it would have been better to give consistency and unity of meaning to the Sherman act by making it definitely a statute against monopolizing. "Interference with the movement of commerce," whether on the part of labor unions or others, is a thing apart from the controlling purpose of the statute. It is a pity that this desirable restriction in the scope of the statute should have been brought

[1] It will still be possible for the courts to restrain interference with interstate commerce by invoking general federal powers, as was done in the Debs case (158 U.S. 564). But this is not likely to be done except where the interference with commerce is of such a character or magnitude as to be a matter of general public concern.

about only indirectly and partially, and by means of the legalization of certain specific things which had been held to interfere with the movement of commerce. If "restraint of commerce," as a thing distinct from "restraint of trade" or "monopolizing," had been stricken out of the list of offenses condemned by the Sherman act, all of the restriction in the scope of the act which labor interests could have desired would have been accomplished without the appearance of unfair discrimination in their favor, without the suspicion of unconstitutionality, and, it may be added, without preventing the courts from restraining any direct physical interference with the actual movement of commerce.

The Clayton act prohibits the acquisition by one corporation of any part of the capital stock of another corporation where the effect may be "to substantially lessen competition" between such corporations, to "restrain commerce," or "to tend to create a monopoly." This provision is useless, although in individual cases it may prove to be mischievous. Ever since the Northern Securities decision, in 1904, it has been clear that the organization of holding companies for the purpose of eliminating competition or the acquisition by one corporation of stock in other corporations with the same end in view is illegal under the Sherman act. The new statute adds nothing to the existing law except that it prohibits such acquisitions of stock in every case in which the effect may be to lessen competition between the corporations directly concerned, even though general competitive conditions may continue to exist in the industry in which such corporations are engaged. Since the new law does not represent an attempt to get rid of the holding company as a general form of business organization, the absolute condemnation of the use of this device to effect the union of two or more competing enterprises is illogical. This is a new and, as it seems to me, unwarranted departure from the general principles of the common law in regard to "reasonable restraints of trade." Very likely little use will be made of this provision. But there is a chance that it may interfere with business arrangements which would be in no respect at variance with the general spirit and purpose of the anti-trust legislation.

Aside from the suppression of competition there are a host of evils connected with intercorporate stockholding which are not touched by the new law. The unfair treatment of minority stockholders, the general confusion in the adjustment of stockholders' and bondholders' equities, the opportunities for various fraudulent practices, and the artificial concentration of financial power, are some of these evils. Frequently these things are found at their worst in the relations between railroad companies and their subsidiaries, and here the Clayton act specifically permits intercorporate stockholdings. But such matters are outside the proper field of "anti-trust" legislation. Holding companies will be necessary so long as states refuse to give certain necessary rights, such as that of holding real property or of constructing a railroad, to corporations not of their own making. Their adequate regulation must wait upon the enaction of a federal incorporation law.

The provisions relating to interlocking directorates reach a larger variety of offenses than those relating to holding companies. In fact, at this point the Clayton act must be regarded as supplementary to the Federal Reserve and Interstate Commerce acts as well as to the Sherman act.

The provisions relating to banks apply only to banks and trust companies "operating under the laws of the United States," or, in other words, to federal reserve banks and their member banks. No such bank or trust company can have a director who is a private banker or a director of a state bank or trust company with aggregate liabilities, in the form of capital, surplus, undivided profits, and deposits, amounting to more than $5,000,000. Nor can any bank in the federal system with aggregate liabilities of the kind specified of more than $5,000,000 have officers, directors, or employees who hold similar positions in any other bank in the federal system. Finally, banks in the federal system, large or small, located in cities of more than 200,000 population may not have directors, officers, or employees who are private bankers in the same city or who hold positions in other local banks.[1]

[1] Exceptions are made in the following cases: (1) Mutual savings banks having no capital stock are not affected. (2) There may be interlocking directors or officials in the case of two (but not more) banks if all the stock of one is owned by stockholders of the other. (3) Class A directors of federal reserve banks (elected banker directors) may be officers or directors of member banks.

These new provisions were not enacted, it is safe to say, because of any real belief that there is a tendency to monopoly in the supply of ordinary commercial loans and discounts. The thing attacked was undoubtedly the alleged concentration of control over such banking resources as are utilized in aiding the larger financial operations of great corporations. That such control exists is not to be doubted, and it cannot be held that it has always been wisely used. But interlocking directorates among banks have in general little to do with this situation, and where they are related to it they are at most a symptom, a convenient mode of effecting co-operation, rather than a basic factor. A general governmental supervision of bankers' syndicates would be more effective than this prohibition of interlocking directorates.

A very common arrangement which will be affected by the new restrictions is the interlocking of the directors of two or more banks in the same city which afford different sorts of banking facilities and are hence complementary rather than competitive. Such alliances between national banks and trust companies are common. The directors who are on the boards of both banks are usually professional bankers or men who have substantial blocks of stock in each bank. There is much to be said for such alliances, and it is hard to see what is to be gained by putting difficulties in their way. But to discuss the probable effect of these provisions upon the general banking situation in any adequate fashion would lead us far afield.

Another provision affects common carriers and corporations or firms having dealings with them in securities or supplies or contracting with them for construction or maintenance. If any director of the carrier, or its president, manager, or agent in the transaction, is a director, manager, or agent of the other concern or has a "substantial interest in it," such dealings may not amount to more than $50,000 in any one year except as the result of competitive bidding under the supervision of the Interstate Commerce Commission. It is strange that so important a provision as this should be limited in its application to cases where officers or directors of the carrier are directly interested in the other corporation or firm. There is no obvious reason why all large transactions of the kind on the part of common carriers should not be subject to competitive

bidding. In its present form the provision leaves the door open for various methods of evasion, although its general effect probably will be wholesome.

The most important change it may be expected to bring about is in the marketing of railroad securities. The presence of influential bankers on the directorates of American railroads has undoubtedly often helped the railroads to place their securities and to secure credit on advantageous terms. But on the other hand the banker-directors have often been able to secure substantial shares of the gains arising from various maneuvers in the field of railroad capitalization, and it is possible that, as a class, they have been more than adequately paid for their services. At any rate, it is highly undesirable that railroads should be managed with an eye to the security market rather than to traffic and earnings. In this particular, at least, the net effect of the new regulation should be good. So also should be the effect of the provision which makes the abuse of trust on the part of officers or directors of common carriers a felony under the jurisdiction of the federal courts.

All of the foregoing provisions relating to interlocking directorates primarily affect banks or common carriers. But it is further provided that no person may be a director of two or more industrial corporations engaged in interstate commerce if one of them has aggregate proprietorship liabilities[1] amounting to more than $1,000,000 and if they are, "by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the anti-trust laws." This is another carelessly worded provision. Except for the provision of the Clayton act itself, which, by similarly careless wording, prohibits one corporation from acquiring the stock of any competing corporation, there is nothing in the anti-trust laws which forbids the elimination of competition between two or more competitors unless either a monopoly results or the agreement is part of a general scheme to create a monopoly. And so far as this new section applies to situations

[1] The statute reads, "capital, surplus, and undivided profits"—a form borrowed from the ordinary bank statement, but inaccurate and confusing when applied to industrial corporations.

where interlocking directorates might, in fact, be a means of effectively suppressing competition, it adds nothing to the Sherman act. Combinations effected with a view to monopoly, whatever the mechanism used as the means of combination, are unquestionably illegal under present interpretations of the Sherman act. If narrowly interpreted the new provision may prevent a large stockholder in two shoe factories, for example, from being a director of more than one of them. Aside from its possible interference with harmless arrangements of this sort, it seems to be useless.[1]

The partial prohibition of interlocking directorates, like the similar prohibition of intercorporate stockholdings, is patchwork legislation. Among the various methods by which harmonious adjustments in corporation policies, for good or for evil, have been secured, these two (often found together) have in recent years become conspicuous. But so far as the suppression of competition is the thing at which the new legislation is aimed, it seems illogical to single out these devices for condemnation and leave such things as intercorporate leases and intercorporate sales of property in fee untouched. And, as we have seen, the use of these and other devices for the purpose of monopolizing is already prohibited by the Sherman act. Some confusion between the relation of these devices to admitted evils in corporation finance and their bearing upon the trust situation may have been a factor in determining the attitude of Congress. American corporation law needs thoroughgoing

[1] The provisions for the enforcement of the foregoing sections of the Clayton act are as follows: Violations of the section requiring competitive bidding under specified conditions are punishable by a fine of not over $25,000 imposed upon the offending carrier, while in addition responsible officials and directors are punishable by a fine of not more than $5,000, or by a year's maximum imprisonment, or both. Prosecutions are by the Attorney-General upon the information of the Interstate Commerce Commission. The enforcement of the other provisions relating to interlocking directorates as well as those relating to holding companies is by means of orders of the Interstate Commerce Commission, the Federal Reserve Board, or the Federal Trade Commission, according as the offending corporation is a common carrier, a bank, or an industrial or trading corporation. Orders are issued only after hearings. To secure compliance with its orders the Commission or Board is to apply to the circuit court of appeals, to which appeals may also be taken by the party against whom the order of the Commission is directed. In either case the findings of the Commission, "if supported by evidence," are final as to the facts. Appeal to the Supreme Court can be taken only upon certiorari.

revision, and the general status of the holding company and the qualifications of directors are among the things most in need of mending. But into this field of the internal relations of the corporation the new legislation does not go. And, so far as the provisions we have been discussing are concerned, its contribution to the arsenal of weapons against the suppression of competition is small.

The trade practices condemned by the Clayton act are (1) discrimination in the prices charged to different purchasers, and (2) tying contracts and factors' agreements. The prohibition of price discrimination leaves room for reducing prices on account of the quantity sold or a lower "cost of selling or transportation," and for "discrimination in price in the same or different communities made in good faith to meet competition." This last exception promises to create difficulties. The prohibition of price discriminations is undoubtedly aimed particularly at the practice of local price-cutting on the part of large combinations for the purpose of crushing local competition. It will be hard to draw the line between price-cutting to "meet competition" and price-cutting to suppress competition. And yet the exception is necessary. Without it those manufacturers and jobbers who can get their products to a given market with minimum transportation and selling costs would have an undue advantage in that market over their competitors.[1] The tendency would be to hamper competition rather than to foster it. The control of price discriminations in competitive trade is at once more difficult and more dangerous than in the field of the natural monopolies.

The prohibition of tying contracts and factors' agreements covers leases and sales of goods (patented or unpatented) made with the understanding that the lessee or purchaser shall not use or deal in the goods of a competitor of the lessor or seller, as well as special discounts or rebates made upon such conditions. But both this

[1] This would in turn lead to attempts on the part of railroads to readjust their rates so as to remove the handicaps put upon their own shippers. Given a system of railroad rates based upon transportation costs, the rigid prohibition of all price discriminations would in the long run be economically advantageous. But with railroad rates based on "charging what the traffic will bear" the economy of such regulation would be small. And it would be disastrous to introduce it suddenly.

prohibition and that of price discriminations apply only to cases where the effect of the prohibited arrangement may be to "substantially lessen competition or tend to create a monopoly in any line of commerce." In fact, these sections prohibit nothing that is not already condemned by the Sherman act.[1] And although the new provisions are to be enforced through orders of the Federal Trade Commission, issued after hearings, the Commission has to apply to the courts for decrees making its orders effective.[2] The general question of what sorts of arrangements may be held to lessen competition or to tend to create monopoly will be determined by the courts. But with the establishment of working precedents it may be expected that the Commission's proceedings will be prompter, simpler, and possibly more efficacious in other respects than the judicial proceedings under the Sherman act. In some cases, moreover, it may be possible to put a stop to attempts to suppress competition before a sufficient degree of monopoly has been achieved to make it feasible to invoke the Sherman act. Nevertheless, I do not believe the net effect will be notably different from what it would have been if the Sherman act had remained the only statute reaching these practices.

There has been a substantial body of well-informed opinion to the effect that the prohibition of specific unfair practices, especially the local price-cut and the factors' agreement, would be an effective supplement to the Sherman act. But this body of opinion took shape before the Supreme Court had indicated, as it did first in the Standard Oil case, that it would consider the use of such devices as prima facie evidence of an intent to violate the law against monopolizing, and before it had begun to include injunctions against the continuance of such practices in its decrees. Much of this opinion, moreover, took the form of a belief that a statute making these unfair practices criminal would prove more efficacious than the criminal provisions of the Sherman act. But the Clayton act does not attach criminal penalties to the violation of its prohibition of

[1] Except possibly, tying contracts relating to the use of supplies or other auxiliaries in connection with a patented article.

[2] The procedure for enforcement is the same as in the case of the provisions relating to holding companies and interlocking directorates.

these practices. In short, it adds nothing to the substantive law on the matter. It merely provides a new procedure, and this may prove to have some advantages.

This brings us to a provision which may come to be of far-reaching importance. The Federal Trade Commission act empowers the Commission to issue orders restraining individuals, firms, and corporations (except banks and common carriers) from using "unfair methods of competition in commerce." These orders are to be issued only after hearings, and are enforceable only through decrees of circuit courts of appeals, and are subject to appeal in precisely the same manner as the orders issued under the various provisions of the Clayton act. Since local price discriminations, tying contracts, and factors' agreements, when they tend to suppress competition, are unquestionably "unfair methods of competition in commerce," the Trade Commission act overlaps the Clayton act to this extent, and makes the special prohibition of these particular practices quite unnecessary.

But unfair competition includes other things as well. The use of bogus competitive companies, espionage of competitors' businesses, coercion in various forms, blacklists and whitelists, the securing of railroad rebates and kindred favors—these and other practices have been used in the suppression of competition and have been held to be evidence of monopolistic intent in cases brought under the Sherman act.[1] So far as such methods are used in connection with an endeavor to establish monopoly, they are illegal under that statute. Or, more accurately, they are held to be part and parcel of a scheme, an effort, or an achieved result, which, taken as a whole, is itself illegal. Where such practices are found to have been used in this illegal way their continuance is often enjoined in the courts' decrees.

So far as this general aspect of unfair competition is concerned, the Trade Commission act, like the Clayton act, adds nothing to the older statute except a new form of procedure. There is the

[1] For a good account of the various forms of unfair competition which have figured in such cases see William S. Stevens, "Unfair Competition," *Political Science Quarterly*, XXIX (June, September, 1914), 282, 460.

difference, however, that it makes specific practices illegal,[1] while the Sherman act condemns the general purpose of the combination which utilizes such practices. This difference is probably not of much practical consequence. In passing upon the validity of orders of the Commission against unfair practices, in cases where the element of monopolizing is present, the courts will of necessity fall back upon precedents established in cases under the Sherman law. There is of course a possibility that there may come to be some broadening of the notion of what constitutes unfair competition as a phase of monopolizing, but, on the other hand, not all of the practices now reached by the Sherman act can be made to appear as unfair methods of competition when isolated and detached from the general business schemes of which they are parts.[2] If in some cases the new procedure will make it possible to reach the monopolizing process in its early stages, much will have been gained. But it is not to be expected that all monopolistic combinations can be dealt with effectively in this way. There will still be a field for the Sherman act.

The prohibition of unfair methods of competition in commerce is not, however, limited to cases in which the use of such methods may tend to establish a monopoly. In this respect the Trade Commission act differs from the Clayton act. The Trade Commission is virtually empowered to establish, through such of its orders as commend themselves to the courts, definite standards of fair competition for all business undertakings engaged in interstate and

[1] They are made illegal, but not criminal, for no penalties are provided.

[2] In the "naval stores case" (*Nash* v. *United States*, 229 U.S. 373), in which an indictment for a conspiracy to monopolize trade by means of various unfair practices was sustained by the Supreme Court, the defense maintained that the individual acts contemplated were not in themselves illegal. Justice Holmes, delivering the opinion of the court, said: "As to the suggestion that the matters alleged to have been contemplated would not have constituted an offense if they had been done, it is enough to say that some of them conceivably might have been adequate to accomplish the result, and that the intent alleged would convert what on their face might be no more than ordinary acts of competition or the small dishonesties of trade into a conspiracy of wider scope, as has been explained more than once. Of course this fact calls for conscience and circumspection in prosecuting officers, lest the unfounded charge of a wider purpose than the acts necessarily import convert what at most would be small local offenses into crimes under the statutes of the United States."

foreign commerce. This may easily prove to be the most important innovation in the new legislation. The full significance of this provision does not seem to have been brought out in the debates in Congress, where most of the emphasis appears to have been put upon its bearing on the trust problem. In the debates "unfair competition" was more than once identified with "restraint of trade." But this definition of unfair competition cannot be squared with what precedents there are for the interpretation of the two phrases, although undoubtedly the two overlap to some extent.

In a large sense, of course, every general statute regulating the conditions under which business is carried on helps to fix a level for competition. It has always been recognized that labor laws, pure-food laws, and laws providing for public supervision of weights and measures, although primarily for the benefit of employees or consumers, have also an important effect in weakening the power of unscrupulous competitors. Furthermore, the whole body of law affecting the relations between business men and those with whom they have dealings goes far to establish the rules under which competition must be conducted. But the law of unfair competition, taken in a narrower sense, bears directly upon the relations between business men as competitors; that is, upon the methods and practices used to gain trade. It establishes the lines beyond which one cannot go in the attempt to divert trade from one's competitors. Lacking statutory definition,[1] it comprises a variety of things found in different branches of the law. Combinations or conspiracies to injure or destroy a competitor's trade by the use of methods that would in themselves be legal, save for the fact of the combination or conspiracy, are, for example, to be put under this general head. And the employment of ordinary forms of competition by a combination or even by an individual may be held to be illegal if inspired by the malicious purpose of injuring a particular undertaking and if not designed to promote the legitimate interests of

[1] The "unfair competition" statutes found in a number of the states relate only to price discriminations. They are in general similar to the provisions of the Clayton act bearing upon the same matter, except that the state laws apply to all price discriminations made with the intent to injure a competitor, even where there is no purpose to establish a monopoly. These statutes are reprinted in *Laws on Trusts and Monopolies*, compiled by Nathan B. Williams for the use of the House Judiciary Committee (Washington, 1914).

the persons employing such methods.[1] These common-law doctrines have a wider application than that suppression of competition or "monopolizing" which is condemned by the Sherman act, for they do not involve the necessity of showing an intent to monopolize. Not the prevention of monopoly, but the protection of the individual business undertaking, is their controlling purpose. The kind of competition which they condemn need not have for its objective the establishment of monopoly; it is sufficient if its direct and primary purpose is to injure or destroy.

Then there is the very different sort of competition which is condemned, not because of its general purpose, but because of the methods which it employs. Inducing a competitor's customers to break their contracts with him is a case in point.[2] But more important are such things as libelous statements and fraudulent misrepresentations. By far the largest number of cases in the general field of the law of unfair competition have to do with fraud, and more especially with methods calculated to enable the offender to trade upon the established good will of a competitive undertaking. The use of trade-marks, brands, firm names, packages of a particular form or appearance, etc., for the purpose of misleading the consumer in respect to the identity of the firm or the origin of the goods is the most common offense of this sort.[3]

I have made this cursory and incomplete review of the general meaning of "unfair methods of competition" merely to suggest the extent to which the Trade Commission act seems to pass beyond what has been the accustomed province of anti-trust legislation. But it is none the worse on that account. Aside from the additional protection which the Commission's power in these matters will give to the rights of business men and of consumers, anything that will

[1] For a general review of the law on these points see Bruce Wyman, *The Control of the Market*, chaps. ii, iii, v. See also E. S. Rogers, "Predatory Price Cutting as Unfair Trade," *Harvard Law Review*, XXVII (December, 1913), 139.

[2] Wyman, chap. iii.

[3] For an excellent popular account of these matters see E. S. Rogers, *Good Will, Trade Marks, and Unfair Trading* (Chicago, 1914). Mr. Rogers has discussed the same subject in a series of papers. See *Illinois Law Review*, III (April, 1909), 551; *Michigan Law Review*, VIII (June, 1910), 613; IX (November, 1910), 29; XI (March, 1913), 358.

raise the general level of competitive standards must be welcomed by those who believe in the retention of competition as a fundamental economic institution. Moreover, it is to be expected that the fact that the statute's condemnation of unfair competition is not made to depend on a proved purpose to create a monopoly will make it a more effective weapon against monopoly itself in its early stages. In this way it may prove a valuable supplement to the Sherman act.[1]

It should not be imagined that the Commission will be able to create offhand a general code of definitions of unfair practices, or that it can make substantial additions to the existing law on the subject. Its orders are subject to review by the courts on all matters of law, and the courts will, of course, define "unfair methods of competition" in the light of existing judicial precedents. The law will grow, as other laws grow, only as individual cases with new characteristics are brought under it. But as to the wisdom of the general policy it embodies there can be, I imagine, no difference of opinion.[2]

The duties of the new Federal Trade Commission are not limited to issuing orders against the use of unfair methods of competition. Composed of five members holding office for seven

[1] While only a few countries have taken a position as definitely opposed to industrial combination as has the United States in the Sherman act, a number of countries have preceded us in adopting statutory declarations against unfair competition. A thing very commonly prohibited is the factors' agreement in its various forms. See, for example, the statutes of Australia, New Zealand, and Canada, reprinted in Williams' *Laws on Trusts and Monopolies*. The recent comprehensive statutes of Germany (1909) and Denmark (1912) relating to unfair competition are reprinted in Hearings before the House Committee on the Judiciary, 63d Congress, 2d session, on Trust Legislation, pp. 1491, 1495. The most interesting departure in both statutes is the careful limitation and regulation of price-cutting "sales." An account of the operation of the German law is given in a British consular report (Cd. 6006–2). For a fuller analysis see A. Pinner, *Gesetz gegen den unlauteren Wettbewerb* (Berlin, 1910). The latest account of the general status of the law of unfair competition in continental Europe is Charles Chenevard's *Traité de la concurrence déloyale* (2 vols., Geneva and Paris, 1914).

[2] It is possible that either the Commission or the courts will refuse to give so broad a meaning as I have suggested to the phrase "unfair methods of competition." But it can hardly be expected that it will not be held to cover much more than the types of unfair competition which have figured in cases under the Sherman act.

years and receiving salaries of $10,000 each, it falls heir to the corps of employees and the unfinished tasks of the Bureau of Corporations.

That Bureau, established by Act of Congress in 1903 in the Department of Commerce and Labor, was authorized "under the direction and control of the Secretary of Commerce and Labor" to investigate the transactions of any corporation or combination engaged in interstate commerce, with the exception of common carriers. Its powers in the way of compelling testimony and the production of books and papers were identical with those of the Interstate Commerce Commission. It was also authorized to gather and publish "useful information" concerning corporations engaged in interstate commerce. The primary purpose of its special investigations of particular corporations and combinations, as stated in the statute creating it, was "to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of commerce," and the President might decide what part of its information should be made public. Established at the behest of President Roosevelt, it was to be an arm of the executive rather than of the legislative or judicial branch of the government. In addition to performing the duties with which it was legally charged, it has co-operated with the Department of Justice in various ways, and some of its investigations have been undertaken at the special authorization of Congress.

The new Commission is not a bureau of any department, but has an independent status, like that of the Interstate Commerce Commission. Some of its work, however, is as a virtual auxiliary of the Department of Justice. At the request of the Attorney-General it is to investigate any corporation alleged to be violating the anti-trust laws, and to make recommendations for the readjustment of its business. This is a wise provision for informal adjustments like those which are so important a part of the work of the Interstate Commerce Commission. In suits in equity brought under the anti-trust acts the Commission may be asked by the court to prepare an appropriate form of decree, which is, of course, subject to rejection or change by the court. The importance of

this provision is in its bearing upon the outcome of dissolution proceedings under the Sherman act. Since the American Tobacco case, it has been recognized that the drafting of a wise plan of reorganization for an offending combination may be an exceedingly difficult matter, requiring not only care and judgment, but also a large amount of technical information about the general conditions of the industry affected. Furthermore, the Commission is authorized to make investigations of the manner in which decrees in suits under the anti-trust acts are carried out. This provision should add much to the efficiency of the operation of the Sherman act.

Like the former Bureau of Corporations, the Commission may investigate and report upon the affairs of industrial and trading corporations engaged in interstate commerce, and it may be asked by the President or either House of Congress to report upon any alleged violation of the anti-trust acts. It has the further power to require annual or special reports from interstate corporations in such form and relating to such matters as it may prescribe. The information it obtains may be made public at its own discretion, "except trade secrets and names of customers." One effect of this provision, it may be hoped, will be to give students of corporation problems a very much more adequate body of authentic and apposite information than they have yet had. If the power to require the use of uniform accounting systems is later given to the Commission, the value of this information will be distinctly enhanced. The Commission's powers to secure the testimony of witnesses and the production of books and papers seem entirely adequate, and are similar to those of the Interstate Commerce Commission.

It is both difficult and hazardous to pass a general judgment upon legislation which comprises so many different provisions and which reaches into fields so new as do these two statutes. But unless the foregoing analysis is altogether mistaken the two cannot be joined for either praise or condemnation. The anti-trust sections of the Clayton act, in the opinion of the present writer, are bungling and generally futile. There is a chance that, at the worst, they may make enough trouble to delay the enaction of the badly needed federal statute dealing thoroughly and systematically with

the promotion, organization, and management of corporations engaged in interstate commerce. At best, so far as I can see, they will be ineffective. The Federal Trade Commission act is a statute of a very different type. It introduces a method of dealing with the admitted evils of unfair competition modeled upon what has proved a successful method of dealing with railroad discriminations. The new machinery it furnishes for the enforcement of the Sherman act is of a kind which experience has shown to be needed. It makes a beginning, at least, in providing for adequate federal statistics of industrial corporations. I see no reason why it should not prove a highly serviceable addition to the nation's industrial code.

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